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ABDUL SAMAD MOHD EMBONG & ORS v. PANTAI BAYU INDAH SDN BHD & ORS AND ANOTHER APPLICATION

HIGH COURT SABAH & SARAWAK, MIRI
DEAN WAYNE DALY JC
[CASE NO: MYY-21NCvC-5/6-2014]
9 AUGUST 2017

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CIVIL PROCEDURE: *Contempt of court – Committal proceeding – Application for recusal of judge presiding case – Contents of affidavit in support repeated outside court – Comments recorded and uploaded on Facebook and circulated on social media – Whether has effect of ridiculing and scandalising judge – Whether deliberate attack on course of justice – Whether tantamount to interfering, impeding or prejudicing due administration of justice – Whether disrespectful towards authority or dignity of court – Whether contempt proven*

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Pursuant to the two notices of applications herein: (i) encl. 229 by the first defendant; and (ii) encl. 231 by the second and third defendants, the defendants sought orders that the respondent, Ng Kim Ho, an advocate and counsel for the plaintiffs, be committed to prison for several contempt of court. The trial of this action commenced before the YA Dato' Lee Heng Cheong ('YA Dato' Lee') as the presiding judge. During the course of the

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trial, the respondent informed the court that the plaintiffs had filed a notice of application ('encl. 192') to recuse YA Dato' Lee from further hearing the case. The ground stated in the recusal application was that, 'we have lost confidence in the ability of Yang Arif Lee Heng Cheong to be fair in conducting the trial.' Enclosure 192 was supported by an affidavit in support

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('encl. 193') affirmed by the respondent. YA Dato' Lee, after hearing the application in chambers, dismissed it with no order as to costs. The respondent was alleged, *inter alia*, to have repeated the allegations contained in the affidavit in support and/or made statements or comments on the application to persons gathered outside the courthouse which were recorded

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in a video and later uploaded on Facebook and circulated in the social media. Nevertheless, YA Dato' Lee, on his own motion, subsequently recused himself from further hearing the case. In his submission, the respondent stated that he was only addressing his clients, the plaintiffs, and was not aware that his briefing was being recorded by them. He also contended that

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it was not him who had uploaded the videos on Facebook and circulated it on social media. However, the respondent stated that he was prepared to defend the rights of his clients' freedom of speech and expression as the contents were of public interest.

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Held (charges of contempt of court proven beyond reasonable doubt):

(1) It was clear from the respondent's submission and his statement that he was condoning his clients' action, in circulating in the social media his statements to the plaintiffs and the public at large, which had the effect of ridiculing and scandalising YA Dato' Lee. (para 24)

(2) The right to criticise is not absolute. There must be some restraint and it must be exercised responsibly. It could be discerned from the respondent's affidavit in support at encl. 193 that, whilst he deposed having the authority to affirm to the affidavit, overall, it was obvious that the allegations contained therein were not made by the plaintiffs. Further, the plaintiffs had not affirmed any affidavit nor adduced any evidence to show that YA Dato' Lee would be prejudiced against them. This clearly showed that the complaints and/or allegations were personal to the respondent. (paras 25, 28 & 30)

(3) The offending statements made by the respondent were very serious and a deliberate attack on the course of justice as administered by the courts in this country. Such unfounded or unjustified attacks upon the judge discharging his judicial duties constituted contempt of court. The respondent, being an advocate and an officer of the court, by using the said offending words or statements at the recusal hearing and after the hearing, had the effect of interfering, impeding or prejudicing the due administration of justice and was likely to undermine or erode public confidence and respect in the administration of justice and the dignity of the Judiciary in this country. (paras 40 & 41)

(4) The offending words used by the respondent and the recusal application tantamount to a direct attack on YA Dato' Lee which imputed improper and bias conduct. The statements in the affidavit at encl. 193 were plain and obvious. Further, there was no evidence to show that YA Dato' Lee was unfair to the respondent's clients, which might justify his clients instructing him to make the application for recusal. Hence, encl. 192 was dismissed. In any event, YA Dato' Lee had, on his own motion, recused himself. (paras 43 & 45)

(5) *Mens rea* is not necessary to constitute contempt of court. The test is whether the matter is calculated to interfere with the course of justice. The respondent had never denied that he had repeated his offending words or statements outside the court to his clients. He also did not deny filing an affidavit containing offending words in support of the recusal application. The respondent sought to recuse YA Dato' Lee from hearing the case further on the grounds that, 'we have lost confidence in

the ability of Yang Arif Lee Heng Cheong to be fair in conducting the trial.' The application for recusal constituted a grave obstruction of justice and such conduct would fundamentally shake men's allegiance to the law. Hence, the offending words and respondent's conduct, both inside and outside the court, were clearly calculated to interfere with the course of justice in order to remove a judge. Without doubt, the respondent's personal scurrilous abuses of YA Dato' Lee were disrespectful towards the authority or dignity of the court and they must therefore constitute contempt of court. (paras 46, 49 & 53-55)

Case(s) referred to:

Attorney-General v. Lingle & Ors [1995] 1 SLR 696 ***(refd)***
Attorney General v. Manjeet Singh Dhillon [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22 SC ***(refd)***
Attorney General & Ors v. Arthur Lee Meng Kuang [1986] 1 LNS 61 SC ***(refd)***
Dato' Dr Joseph Eravelly v. Dato' Hilmi Mohd Nor & Ors [2011] 3 CLJ 294 HC ***(refd)***
Leong Siew Fung & Ors v. Leong Shan Nam & Other Suits [1998] 1 LNS 314 HC ***(refd)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 CA ***(refd)***
PP v. SRN Palaniappan & Ors [1949] 1 LNS 66 HC ***(refd)***
R v. Gray [1900] 2 QB 36 ***(refd)***
Re Zainur Zakaria [1999] 3 CLJ 696 HC ***(refd)***
Rex v. Davies [1906] 1 KB 32 ***(refd)***
Sivalingam S Ponniah & Ors v. Balakrishnan S Ponniah & Ors [2003] 1 LNS 222 HC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 52 rr. 3(2), 4

For the plaintiffs - Dominique Ng Kim Ho; M/s Dominique Ng & Assocs
For the 1st defendant - Mekanda Singh Sandhu & Kalveet Singh Sandhu; M/s Sandhu & Co Advocs
For the 2nd and 3rd defendants - JC Fong, Mohd Adzrul & Mohamad Muhaimin; SFCs
For the 4th defendant - Victor Wong; M/s Victor Wong & Chiew Advocs

Reported by S Barathi

JUDGMENT

Dean Wayne Daly JC:

The Applications

[1] There are two notice of applications before this court. Enclosure 229 dated 8 May 2017 was filed by the first defendant. It is supported by an affidavit of Ng Yoon Thai affirmed on 5 April 2017 (encl. 212). Enclosure 231 also dated 9 May 2017 was filed by the second and third defendants. It is supported by an affidavit affirmed by Mohamad Muhaimin bin Zakaria on 29 March 2017 (encl. 232).

[2] These applications were filed after the first, second and third defendants obtained leave of the court on 26 April 2017 to issue the same. By the said applications, the first, second and third defendants are seeking for an order that, the respondent, Ng Kim Ho (also known as Dominique Ng Kim Ho), an advocate, who is the counsel for the plaintiff, be committed to prison for several contempt of court.

The Grounds In Support Of Enclosure 229

[3] The grounds in support of the application at encl. 229 are:

(a) that the said Ng Kim Ho affirmed an affidavit in support on 6 March 2017, filed in support of an application for an order that Yang Arif Dato' Lee Heng Cheong be recused from the trial of this case in which he allegedly *inter alia*,

(i) that the said judge is unable to conduct the trial with due fairness and impartiality towards the plaintiffs and him in his capacity as their counsel;

(ii) the said judge had shown that he was biased against him in this and two other trials and was prejudiced against him; and

(iii) that he had failed to preside over the case with impartiality and had allowed his personal bias and/or prejudice to get in the way of what is supposed to be the course of justice;

(b) that he repeated one or more of the above allegations contained in the said affidavit in support and/or making statements or comments on the application for an order for the recusal of the judge to persons gathered outside the courthouse on 6 March 2017 which statements or comments were recorded in a video and uploaded onto the Facebook later and circulated in the social media;

(c) that he published the proceedings relating to the hearing of the said application for an order for recusal of the said judge which took place in chambers on the 6 March 2017 to persons gathered outside the courthouse;

(d) that he made the statements or comments on the said application for an order for the recusal of the said judge to persons gathered outside the entrance of the courthouse on 6 March 2017 when the application was pending determination by the court; and

(e) that the making and/or publication of the said allegations or statement were calculated to and were likely to have the effect of scandalising the court and or impeding or prejudicing or interfering with the course of justice and/or eroding public confidence in the administration of justice.

[4] The first defendant also relied on the statement dated 5 April 2017 (encl. 211) filed in the application for leave.

The Grounds In Support Of Enclosure 231

[5] The grounds in support of the application at encl. 231 are:

(a) That Ng Kim Ho had committed several contempt against this honourable court by affirming and filing an affidavit in support of an application for an order that the said YA Arif Dato' Lee Heng Cheong recused himself from hearing of the suit ("recusal application") wherein he made allegations and/or personal "attacks" on the character and judicial integrity against YA Dato' Lee including, *inter alia*:

(i) YA Dato' Lee was "unable to conduct the trial with due fairness and impartiality towards the plaintiffs and their counsel";

(ii) YA Dato' Lee had a "strong prejudice against him! Which stared ever since" two other trials, unrelated to the said suit, wherein Ng Kim Ho acted as counsel for parties in those unrelated trials; and

(iii) the said YA Dato' Lee "has allowed his personal biasness and/or prejudice to get in the way of which is supposed to be a course of justice;"

(b) Prior to and after delivery of judgment by YA Dato' Lee on the recusal on 9 March 2017 the said Ng Kim Ho, outside the premises of the court room, made various statements to the plaintiffs and the public at large which were recorded in video and circulated in the social media ridiculing and scandalising Justice Lee; and

(c) The other grounds are as stated in the statement pursuant to O. 52 r. 3(2) of the Rules of Court 2012 dated 6 April 2017, and affidavit in support of Mohamad Muhaimin bin Zakaria affirmed on 29 March 2017 annexed to this encl. 231.

Affidavits In Opposition

[6] There are two affidavits in opposition affirmed by Ng Kim Ho, both affirmed on 31 May 2017. Enclosure 245 was in respect of encl. 229 and encl. 246 relates to encl. 231.

Procedural Requirements

[7] It was incumbent on the applicants to serve the relevant documents on the respondent pursuant to O. 52 r. 4 of the Rules of Court 2012. (See *Sivalingam S Ponniah & Ors v. Balakrishnan S Ponniah & Ors* [2003] 1 LNS 222; [2003] 3 MLJ 353).

[8] The first defendant had duly served the following documents personally on Ng Kim Ho on 23 May 2017 together with a covering letter from Messrs Sandhu & Co. Advocates, namely:

(i) the sealed copy of encl. 229;

(ii) statement dated 5 April 2017 in encl. 211;

(iii) affidavit in support of Ng Yoon Thai affirmed on 5 April 5 2017 (encl. 212) which was used in the application for leave; and

(iv) the sealed copy of the amended order re-dated 16 May 2017 leave (encl. 241).

[9] Affidavit of service in respect of the above documents was affirmed by one Ronald Felix Hardin on 30 May 2017 (encl. 243). A covering letter for the same dated 22 May 2017 is found in exh. "R1."

[10] The second and third defendants had duly served the following documents personally on Ng Kim Ho on 22 May 2017 together with a covering letter from the State Attorney-General Chambers dated 16 May 2017, namely:

(i) Notice of application for order of committal (encl. 231);

(ii) Affidavit in support affirmed by Mohamad Muhaimin bin Zakaria dated 29 March 2017 (encl. 232);

(iii) Statement pursuant to O. 52 r. 3(2) of the Rules of Court 2012, dated 6 April 2017 (encl. 233); and

(iv) Court order dated 8 May 2017 (encl. 230).

[11] Affidavit of service in respect of the above documents was affirmed by one Mohamad Muhaimin bin Zakaria on 31 May 2017 (encl. 247). The covering letter dated 16 May 2017 is found in exh. "M1".

Background

[12] The trial of this action commenced on 1 March 2017 before High Court at Miri. YA Dato' Lee Heng Cheong was the presiding judge. The trial went on for three days. It was adjourned for continuation of hearing on Monday, 6 March 2017.

[13] However, learned counsel for the plaintiff/respondent informed the court on the said date that the plaintiffs had filed a notice of application (encl. 192) to recuse YA Dato' Lee from further hearing the case. The ground stated in the recusal application was that, "we have lost confidence in the ability of Yang Arif Lee Heng Cheong to be fair in conducting the trial."

[14] Enclosure 192 was supported by an affidavit in support affirmed by the respondent on 6 March 2017.

[15] The hearing of encl. 192 was heard by YA Dato' Lee in chambers. After submissions by parties, the application was adjourned for ruling on 9 March 2017. Enclosure 192 was dismissed on the said date with no order as to cost. Nevertheless, YA Dato' Lee recused himself from further hearing the case on his own motion. (See short ruling at exh. 'M4' in encl. 232).

Submissions And Findings

[16] I have duly considered both the written and oral submissions of learned counsel and the respondent on the applications having regard the pertinent enclosures referred to herein.

[17] Essentially, it was the respondent's submission that he was not the one responsible for uploading the video on the briefing given by him on 6 March 2017 onto the social media.

[18] He averred in para. 13 of his affidavit at encl. 245 that:

> With respect to paragraphs 9 and 10 of Ng Yoon Thai's Affidavit, I say that I was only addressing my clients who had been waiting anxiously outside the courtroom for the news of the Recusal Application. They have been turning up in strength and following the trial daily and had instructed me to file the said Recusal Application. I have also been regularly briefing them there for most of the trial or hearing days for this case. I was not aware that my briefing was being recorded by my client (s) at the time. And it was not me who uploaded it on Facebook and circulated it on the social media. But I do support and am prepared to defend my clients' right, and freedom, to take a recording of my briefing, to upload it on Facebook and to circulate it on the social media. Because the contents, in their minds, are of great public interest.

[19] He submitted that since the defendants have both chosen not to reply to the affidavit in oppositions in encls. 245 and 246 on the above, it is trite that they are deemed admitted.

[20] Mr MS Sandhu, learned counsel for first defendant submitted that, the allegation that Ng Kim Ho did not upload the video on the briefing given by him on 6 March 2017 was of no legal consequence as their application was not based on the act of circulating the allegations onto the social media.

[21] Datuk JC Fong State Legal Counsel for the second and third defendants on the other hand submitted that, the respondent does not deny that he spoke out against the judge outside the court but explained that he was addressing his clients.

[22] The respondent then in his oral submission said that he is prepared to defend the rights of his clients of freedom of speech and expression. He further said that he is obligated to defend them after checking the video clip on what he said to them and their uploading of the same onto Facebook because the content was of public interest.

[23] This echoed what was deposed by him in para. 13 of the affidavit in opposition encl. 245:

> But I do support and am prepared to defend my clients' right, and freedom, to take a recording of my briefing, to upload it on Facebook and to circulate it on the social media. Because the contents, in their minds, are of great public interest.

[24] It is clear from the respondent's submission and that part of his statement that, he is condoning his clients' action in circulating in the social media his statements to the plaintiffs and the public at large which have the effect of ridiculing and scandalising YA Dato' Lee.

[25] It must be borne in mind that the right to criticise is not absolute. There must be some restraint. It must be exercised responsibly. It was held *inter alia* in *Attorney-General v. Lingle & Ors*. [1995] 1 SLR 696 at p. 701 that:

> ... No one is entitled under the guise of freedom of speech and expression to make irresponsible accusations against, *inter alia*, the judiciary, otherwise public confidence in the administration of justice will be undermined.
>
> This right to criticise is, however, exceed and contempt of court is committed if the publication impugns the integrity and impartiality of the court, even if it is not so intended. See *R v. Odham Press Ltd & Ors*, where at p 80 Lord Goddard CJ said:
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> > These cases clearly show that lack of intention is no excuse, though it may have great bearing on the punishment which the court will inflict and, in our opinion, they dispose of the argument that *mens rea* must be present to constitute a contempt of which the court will take cognizance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame.

[26] In regard the filing of the application for the recusal of YA Dato' Lee Heng Cheong (encl. 192), the respondent submitted that he has the instruction from his clients to do so. He also claimed that he has instructions to file the affidavit in support of the same. However, none of the plaintiffs deposed to any affidavit in support encl. 192.

[27] He further submitted that there was a necessity to show the history where YA Dato' Lee had given rulings against him in previous occasions.

[28] However, it could be discerned from his affidavit in support at encl. 193 that, whilst he deposed having the authority to affirm to the affidavit, overall, it was obvious that the allegations contained therein were not made by the plaintiffs. The following paragraphs of his affidavit in support clearly showed that the allegations emanated from the respondent himself, ie,:

> 5. I say that we have reached a stage where the continuation of this trial before the same Judge will surely jeopardise the fair result or outcome of the case as Yang Arif Lee has shown in various situations narrated below that he is unable to conduct the trial with due fairness and impartiality towards the parties and counsels, specifically towards the Plaintiffs and their counsel.;
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> …
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> 7. On all occasions where I have attempted to conduct the rightful reexamination of my witnesses, I have been objected to by the Defendant's counsels one after the other and Yang Arif has made no attempt to stop them but have actually or indirectly by his conduct and partiality encouraged them to continue interrupting my reexamination by constantly siding with them and/or loudly scolding or castigating me for all and every infraction, imagined or real. In doing so, Yang Arif has shown his biasness against me and has thereby obstructed me from carrying out my professional duty as an advocate for my clients.
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> 8. I say that this is not the first time I have been forced to endure such biased treatment from Yang Arif Lee! I say that I have had two other recent trials before Yang Arif Lee, … It would seem that Yang Arif Lee has harboured and/or is harbouring a very personal grudge with me and would find every chance and excuse to chastise me or find fault with me, even in open court …
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> 9. I say that Yang Arif Lee has a strong prejudice against me! Which has started ever since the trial of *Teknojaya* and followed by the next trial in *Ali Jeman* and now this trial. Yang Arif Lee has similarly shouted and castigated me loudly almost every day of the 2 trials for all reasons or excuses, in open court …
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> 10. I say that Yang Arif Lee has already ruled against me in the *Teknojaya* case by choosing to believe in documents which have been proven to have been concocted well after the fact and even admitted by the Plaintiff! …

13. Now in the current trial, in just 3 days Yang Arif Lee has shown his very clear intentions to continue with his personal attacks and verbal abuses of me and which involves shouting at and/or scolding me in front of my clients in open court. I do consider these attacks and verbal abuses as deliberate and being directed at denigrating my personal competency as a qualified, professional and experienced advocate of the High Court of Sabah and Sarawak.

…

20. I therefore say that Yang Arif Lee has failed to preside over the case without prejudice and with impartiality! He has allowed his personal biasness and/or prejudice to get in the way of what is supposed to be a course of justice!

[29] YA Dato' Lee in dismissing the recusal application had this to say in his short ruling (exh. N5) in regard the above allegations:

[11] Mr. Ng however sought to contend that the 2 cases cited by him and my alleged constant rebukes of him in his Affidavit in Support showed that I have a past history of being seriously biased against him. In both these two cases and other cases, I have exercised my judicial discretion based solely on the evidence and the law before me.

[12] If Mr. Ng's contention is allowed to stand then it will open a floodgate of applications to recuse judges just because judges have ruled against the same lawyers previously and constantly rebuke them with good reasons.

[13] If I have exercised my discretion rightly or wrongly, Mr. Ng's clients always has the right to appeal against my decisions and which he did in the *Technojaya*'s case …

[30] In any event, the fact that the plaintiffs have not affirmed any affidavit nor have adduced any evidence to show that Justice Lee would be prejudiced against them, clearly showed that the complaints and/or allegations were personal to the respondent.

[31] The respondent also submitted that the first, second and third defendants had failed to rebut the allegation of bias against YA Dato' Lee Heng Cheong.

[32] The respondent had alleged in para. 5 to 19 of the affidavit in support (encl. 193) that YA Dato' Lee was bias against him when he presided the trials in two previous or earlier cases, namely, *Teknojaya Construction Sdn Bhd v. Telliana Plantations Sdn Bhd* (MYY-22-13/6-2013) and *Ali Jeman v. Indranika Jaya Sdn Bhd* (KCH-22-71/8-2013). The respondent was a counsel for one of the parties.

[33] The respondent alleged that he had to "endure such biased treatment from Yang Arif Lee! … The same treatment was seemingly directed at me but not at the opposing counsel regardless of who they were." (para. 8 encl. 193).

[34] The fact that those two cases did not involve the plaintiffs in this case goes to show that it was alleged grievances in those two cases only concerned the respondent. By making allegations on what allegedly transpired in those two cases, the respondent is essentially saying that he would not get a fair trial.

[35] The respondent had at para. 20 of his affidavit in support, deposed as follows:

> I therefore say that Yang Arif Lee has failed to preside over the case without prejudice and with impartiality! He has allowed his personal biasness and/or prejudice to get in the way of what is supposed to be a course of justice.

[36] However, this court was of the view that the issue was dealt with and disposed by YA Dato' Lee in the short ruling at para. [11] and [12] above and para. [23] below:

> [23] In the light of my above findings, I find that Enclosure 192 does not satisfy the test of "real danger of bias" at all. I find that Enclosure 192 is contemptuous, frivolous, oppressive, malicious, scandalous, an abuse of the Court process and wholly without merits. In the premises, I dismiss Enclosure 192 with no order as to cost.

[37] It must be borne in mind that encl. 192 was heard in chambers. However, the offending statements by the respondent was repeated outside the court. It was circulated in the social and media mass. Hence, the learned judge saw it fit to deliver his "short ruling" on the recusal application in open court. He began as follows:

> [1] I noted and was informed that this pending matter has been published in the mass and social media presumably by the Plaintiffs and Mr Ng. This is one of the reasons why I am delivering this Short Ruling in Open Court, to defend the dignity of my high office and/or the administration of justice. (Pages 2-3 of Exhibit "M4" in enclosure 232)

[38] The learned judge in his "short ruling" also found the application and statements contained therein to be contemptuous. It read:

> [23] In light of my above findings, I find that Enclosure 192 does not satisfy the test of "real danger of bias" at all. I find that Enclosure 192 is contemptuous, frivolous, oppressive, malicious, scandalous, an abuse of the process and wholly without merits. In the premises, I dismiss Enclosure 192 with no order as to cost.

[39] It was noted that, there was no appeal made by the plaintiffs against the said findings. A

[40] This court was of the opinion that offending statement made by the respondent in his affidavit in support and to his clients in public and which briefing was video recorded and circulated in the social media (See the transcript and translation in exhibit marked "M3" in encl. 232), are very serious and deliberate attack on the course of justice as administered by the courts in this country. B

[41] Such unfounded or unjustified attacks upon the judge discharging his judicial duties constitutes contempt of court. The respondent being an advocate and an officer of the court, by using the said offending words or statements at the recusal hearing and after the hearing, they have the effect of interfering, impeding or prejudicing the due administration of justice and is likely to undermine or erode public confidence and respect in the administration of justice and the dignity of the Judiciary in our country. C D

[42] In *Public Prosecutor v. S.R.N. Palaniappan & Others* [1949] 1 LNS 66; [1949] 1 MLJ 246 Spenser-Wilkinson J at p. 248 agreed with the judgment in *Rex v. Davies* [1906] 1 KB 32 where part of the undelivered judgment of Wilmot CJ is quoted with approval as follows:

> Attacks upon judges, he says, 'excite in the minds of people a general dissatisfaction with all judicial determinations … and whenever men's allegiance to laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are channels by which … justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open and unimpaired current which it has for many ages found all over this kingdom. E F

[43] This court was of the view that the offending words used by the respondent and the recusal application tantamount to a direct attack on YA Dato' Lee which impute improper and bias conduct. The statements in the affidavit at encl. 193, are plain and obvious. They were clearly intended to do just that, to get a recusal. No doubt, encl. 192 was dismissed. But, YA Dato' Lee on his own motion recused himself. G

[44] YA Dato' Lee cited the judgment of the late Justice VT Singham in *Dato' Dr Joseph Eravelly v. Dato Hilmi Mohd Nor & Ors* [2011] 3 CLJ 294 at p. 307 before ruling as follows: H

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> [25] I share and is in the similar position as the late Justice VT Singham. In the premises I shall recuse myself from hearing this case, on my own motion, in order to preserve the integrity and reputation of this sacred seat that I occupy. (page 9 of Exhibit "M4" of Enclosure 232)

[45] Indeed, there was no evidence to show that YA Dato' Lee was unfair B to the respondent's clients, which might justify his clients to instruct him to make the application for recusal. It must be borne in mind that the learned judge did mention in the short ruling of two instances where he had ruled in favour of the plaintiffs. Paragraph [14] of the ruling read:

> [14] Mr Ng has a selective memory. He only submitted on the occasions C that I ruled against him. What about the incidents in this very case when I ruled in favour of the Plaintiffs and/or him and rejected the 1st Defendant's application to strike out his client's case twice, firstly by way of striking out application and secondly when the Plaintiffs failed to comply with an "unless order". If indeed I have a personal grudge against Mr Ng as alleged, would have allowed either 1 of D these 2 striking out applications, but I exercised my discretion based on the law and evidence in favour of Mr Ng or the Plaintiffs otherwise his client's case against the 1st Defendant would have been struck out." (Page 6 of Exhibit "M4" of 5 Enclosure 232)

Whether The Respondent Had Committed Contempt Of Court

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[46] *Mens rea* is not necessary to constitute contempt of court. The test is whether the matter is calculated to interfere with the course of justice. (*Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65 (CA)).

[47] On what is contempt of court, Augustine Paul J (as he then was) in F *Re Zainur Zakaria* [1999] 3 CLJ 696; [1999] 2 MLJ 577 wherein His Lordship at p. 591 cited with approval the following passage of judgment in *R v. Gray* [1900] 2 QB 36 at p. 40 where Lord Russel said:

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of G court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or lawful process of the courts is a contempt of court. The former class belong to the category which Lord Hardwicke LC characterised as 'scandalising a court or a judge'. The description of that class of contempt is to be taken subject to one and an important qualification. Judges and H courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such object is published; but it is to be remembered that in this matter, the liberty of the press is no greater and

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> no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that it is not contempt of court and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense that I have described. It is not criticism: I repeat, it is a personal scurrilous abuse of a judge as a judge.

[48] Further, in *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 FC at pp. 858-859 Arifin Zakaria CJ (as he then was) in delivering the judgment of the court held that:

> A good starting point would be the definition of contempt of court itself. *Oswald's Contempt of court* (3rd edn) at p. 6 gives a general definition of contempt of court as follows:
>
> > To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.

[49] Throughout his submissions, the respondent never denied that he had repeated his offending words or statements outside the court to his clients. He may have denied knowing that his clients had recorded them on video and that they were circulated in the social media, but, the fact remains that he had condoned it. He also did not deny filing an affidavit containing offending words in support of the recusal application.

[50] The respondent had cited the case of *Attorney General & Ors v. Arthur Lee Meng Kuang* [1986] 1 LNS 61; [1987] 1 MLJ 206 and *Attorney General v. Manjeet Singh Dhillon* [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22 to support his contention that no criticism of the judgment, however vigorous can amount to contempt of court provided it keeps within the limits of reasonable courtesy and good faith.

[51] However, in this case, the respondent's allegations in his affidavit at encl. 193 tantamount to personal attacks on YA Dato' Lee Heng Cheong. The learned judge had this to say:

> [23] In light of my above findings, I find that Enclosure 192 does not satisfy the test of 'real danger of bias' at all. I find that Enclosure 192 is contemptuous, frivolous, oppressive, malicious, scandalous, an abuse of the Court process and wholly without merits. In the premises, I dismiss Enclosure 192 with no order as to cost.

[52] Ian Chin J (as he then was) in *Leong Siew Fung & Ors v. Leong Shan Nam & Other Suits* [1998] 1 LNS 314; [1998] 4 MLJ 352 noted that while justice must be allowed to suffer the scrutiny and respectfully, even though outspoken, of ordinary men, it was not so in that case. He opined that at p. 359 that:

A This case is different. It went beyond that. The allegations had impaired and will impair public confidence in the administration of justice because the advocate had said expressly and by implication that I will be deciding cases with no regard to the evidence and the law, in other word without regard to where the truth lies. The advocate, as was said in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 MLJ 213 at p 223, ought to have faith in the court's ability to decide the case upon the evidence and also as much faith in the ability of the Court of Appeal to intervene where a judge has decided a case otherwise than in accordance with the law and the evidence. In fact, the Court of Appeal had in that case (at p 220) sounded the warning the warning which the advocate had chosen to ignore:

> In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.
>
> In my view, what the advocate had said when seeking to disqualify me from hearing the cases is in contempt of the court.

[53] This was exactly what had happened in the present case. The respondent had sought to recuse YA Dato' Lee Heng Cheong from hearing the case further on the grounds that, "we have lost confidence in the ability of Yang Arif Lee Heng Cheong to be fair in conducting the trial."

[54] The respondent by making the application for recusal in the manner that he did constitute a grave obstruction of justice and such conduct, which would shake fundamentally men's allegiance to law.

[55] This court was of the view that the offending words and respondent's conduct both inside and outside the court were clearly calculated to interfere with the course of justice in order to remove a judge. Without doubt, the respondent's personal scurrilous abuses of YA Dato' Lee are disrespectful toward the authority or dignity of the court and they must therefore constitute contempt of court.

Conclusion

[56] In view of the above reasons, it is the judgment of this court that the first, second and third defendants have succeeded in proving the charges of contempt of court in their respective applications against the respondent, Ng Kim Ho beyond reasonable doubt.

[57] In fairness to the respondent, I shall fix another date for him to make representation before a penalty is imposed. I invite a representative each from the Federal Attorney General Chambers and the Advocates Association of Sarawak to attend at the next date to act as *amicus curiae*.

Order accordingly.